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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/919,961	08/02/2001	Thomas M. Collins	2280.2770	4327
5514	7590	04/09/2004	EXAMINER	
FITZPATRICK CELLA HARPER & SCINTO			MADSEN, ROBERT A	
30 ROCKEFELLER PLAZA			ART UNIT	
NEW YORK, NY 10112			PAPER NUMBER	

1761

DATE MAILED: 04/09/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/919,961

Applicant(s)

COLLINS ET AL

Examiner

Robert Madsen

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 08 December 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,5-16 and 18-22 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,5-16,18-22 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

DETAILED ACTION

1. The Amendment filed December 8, 2003 has been entered. Claims 1,5-16,18-22 remain pending in the application.

Claim Rejections - 35 USC § 103

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

3. Claims 1, 5-7,9,12-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Laval Jr. (US 2837042) in view of Nishi (JP 61035748) and Boyce et al. (US 5996768).

4. Regarding claims 1,5-7,9,12-15, Laval teaches the generic concept of supplying candy pellets (i.e. items 131, 270) from a hopper (i.e. items 16,255) to drum conveyor utilizing vacuum transfer with pockets (i.e. items 45,235), as recited in claims 9,12, transporting the candy pellets in the pockets to transfer station (i.e. a lower releasing station at items 80/82 and 245/246) applying candy pellets in a pattern onto an edible substrate (e.g. items 130 or 221) as recited in claim1 , wherein the drum conveyor is tangent to and above to the edible substrate supported by an endless conveyor at a transport station as recited in claims 13-15 (Column 8, lines 30 to 65,Column 9, lines 25-75, Figures 1, 2, 5, and 6). While Laval teaches fresh dough is soft enough to receive the pellets directly, or no recesses are required, (Column 9, lines 70-73), Laval also teaches that with some substrates, such as firm cereal, recesses that are filled with an edible glue, such as sugar syrup as recited in claims 5 and 6, have to be formed to adhere the pellet to edible substrate (Column 5, lines 6-27, 64-70, Column 6, lines 34-

70), but Laval is silent in teaching chocolate is the edible substrate as recited in claim 1, or providing a chocolate nub that is heated as the edible glue as recited in claim 7.

Additionally, although Laval teaches the arrangement of pockets in the drum is not limited to the disclosed configuration and depends on the desired candy placement design (Column 8, lines 47-65), Laval is also silent in teaching the drum conveyor comprises carrier bars and pockets as recited in claim 1.

5. With respect to providing a chocolate substrate with recesses with a chocolate nub as the edible glue, Nishi is relied on as evidence of the conventionality of decorating chocolate substrates. Nishi teaches applying a decorative arrangement to a pre molded chocolate substrate using a nub of molten chocolate that is melted (See Figures 1-4 in light of the JPO and Derwent English Abstracts). Therefore, it would have been obvious to modify the edible substrate of Laval and provide a chocolate substrate since Nishi teaches decorating an edible substrate with a decorative arrangement and one would have been substituting on conventional edible substrate for another for the same purpose. To further provide a recess in the chocolate, as well as a chocolate nub that is melted to adhere the candy pellet to the chocolate, would have been an obvious result effective variable of the texture of the chocolate since Nishi teaches decorative candies adhere to chocolate via a melted nub of chocolate and Laval teaches soft edible substrates do not require recesses or edible glue, while hard edible substrates require recesses to receive the pellets and edible glue for adherence. One would have been substituting one conventional method of attaching a candy to the surface of substrate for another.

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6. With respect to carrier bars, Boyce et al. also teach a drum conveyor which transfers pellets from a hopper onto a substrate conveyor in a particular orientation and wherein the drum is above and tangent to the substrate. However, Boyce et al. teach the conventional drum conveyor does not allow for quick changeovers to accommodate various pellet orientation and sizes. Boyce et al. teach that by using carrier bars with the pockets one is able to quickly change over the drum to various orientation and sizes (Abstract, Figures, Column 2, lines 6-24, Column 3, line 1 to column 4, line 65). Therefore, it would have been obvious to modify Laval and provide carrier bars since Boyce et al. teach this provides easy changeovers to different sized pellets and orientation. One would have been substituting one conventional drum conveyor design for another for the same purpose: using a drum conveyor to transfer pellets from a hopper onto a substrate conveyor in a particular orientation, wherein the drum is above and tangent to the substrate.

7. Claims 8, 10, and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Laval Jr. (US 2837042) in view of Nishi (JP 61035748) and Boyce et al. (US 5996768) as applied to claims 1, 5-7, 9, 12-15 above, further in view of Ackley (EP0915014A).

8. Regarding claim 8, Laval teaches a drum conveyor, but is silent in teaching a ramp conveyor. Ackley teaches the same general conveying concept as Laval: pellets are transferred from a hopper to a first conveyor, arranged in a desired pattern, and transferred from the first conveyor in the pattern to a substrate on a second conveyor

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below the first conveyor. Ackley teaches the first conveyor may be either a vacuum transfer drum conveyor or a ramp-feed conveyor (Abstract, Figures 1-4, and paragraphs 14,16,18-21,27). Therefore, it would have obvious to modify Laval and use a ramp conveyor since Ackley teaches in a process where pellets are transferred from a hopper to a first conveyor, arranged in a desired pattern, and transferred from the first conveyor in the pattern to a substrate on a second conveyor below the first conveyor, one may use either a drum or ramp conveyor, and one would have been substituting one conventional conveyor for another for the same general process.

9. Regarding claims 10,as discussed above in paragraph 4, Laval teaches a transfer station (i.e. the lower release station) is comprised of suction elements for picking up and releasing the pellet shaped candy pieces (e.g. the manifold 245, chamber 246, and suction elements 247 that pass below items 245/246 in Figure 6 form the transfer station) wherein the suction elements are arranged in a pattern corresponding to a predetermined pattern (i.e. note Figures 6 and 7, Column 9, lines 56-70).

10. Regarding claim 11, Laval teaches the edible substrate is transported on a substrate conveyor proximate to a transfer station (e.g. the lower release station is above lower carrier 177 in Figure 6).

11. Claim 16 is rejected under 35 U.S.C. 103(a) as being unpatentable over Laval Jr. (US 2837042) in view of Nishi (JP 61035748) and Boyce et al. (US 5996768) as applied to claims 1, 5-7,9,12-15 above, further in view of Morishita et al. (JP 63196229 A).

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12. To further include a step of printing on the pellets located in the pockets would have been an obvious matter choice, depending on the desired decoration since both Nishi and Morishita et al. teach a pre-decorated edible item applied to an edible substrate (See Nishi item 20 in Figure 4, See Morishita et al. English Abstracts, Figures). One would have been substituting one conventional one step of preparing an edible substrate with smaller edible items applied in a pattern for another.

13. Claims 18-22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ackley (EP0915014A) in view of Boyce et al. (US 5996768).

14. Regarding claims 18-22, Ackley teaches an apparatus comprising a hopper (item 20) for holding pellet shaped items, mounted on a drum conveyor (item 26) as recited in claim 20 or alternatively a ramp conveyor as recited in claim 19 (Column 6, 14-20), having pockets (items 28), for receiving the pellets such that the pellets are arranged in a predetermined pattern (i.e. note items 46, 48, and 50 in Figure 1 relative to Figure 4), a printing station (item 36) to print on the pellets while in the pockets as recited in claim 22, a transfer station (i.e. below drum 26 and above conveyor 44) for transferring the pellet shaped items to a substrate having recess (blister 46 with recesses 48) while maintaining the predetermined pattern, and a substrate conveyor (i.e. item 44) for delivering the substrate to the transfer station, as recited in claim 1 (Paragraphs 26-31, 33). Ackley optionally utilizes suction for picking up and receiving as recited in claim 21 (Paragraph 31). Ackley differs from claims 18-22 by not teaching (1)

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carrier bars with the conveyor, (2) the pellet is candy, and (3) the substrate with recesses is a chocolate tablet.

15. Boyce et al., like Ackley, also teach a drum conveyor which transfers pellets from a hopper onto a substrate conveyor in a particular orientation. However Boyce et al. teach modifying the conventional drum conveyor to one having carrier bars will provide a more versatile machine that will allow for quick changeovers to accommodate various pellet orientation and sizes as well as being easier to machine since a flat carrier with pockets is easier to precision machine than a round cylinder (Abstract, Figures, Column 2, lines 6-24, Column 3, line 1 to column 4, line 65).

16. Therefore it would have been obvious to modify the apparatus of Ackley and include carrier bars on the conveyor since this would improve the versatility of the machine and allow for quick changeovers for various sizes and orientations. One would have been substituting one conventional conveyor design for another for the same purpose: transferring and orientating pellets from a hopper to a substrate conveyor.

17. Although Ackley is silent in teaching the particular materials worked upon, Ackley modified does teach an apparatus that places pellet shaped items in a pattern onto a substrate comprising recesses for receiving the pellet shaped items. Thus, modified Ackley meets the recited structural limitations. Applicant is reminded that an "apparatus must be distinguished from the prior art in terms of structure rather than function" (In re Schreiber, 128 F.3d 1473, 1477-78, 44 USPQ2d 1429,1431-32 (Fed.Cir. 1997)) "Expressions relating the apparatus to contents thereof during an intended operation are of no significance in determining patentability of the apparatus

claim." Ex parte Thibault, 164 USPQ 666, 667 (Bd. App. 1969). Furthermore, "[i]nclusion of material or article worked upon by a structure being claimed does not impart patentability to the claims." In re Young, 75 F.2d 966, 25 USPQ 69 (CCPA 1935) (as restated in In re Otto, 312 F.2d 937, 136 USPQ 458, 459 (CCPA 1963)).

Response to Arguments

18. Applicant's arguments with respect to the rejections made in the previous office action in light of the *amended* claim language have been fully considered and are persuasive. The rejections made in the Office Action mailed June 4, 2003 have been withdrawn. However, upon further consideration, new grounds of rejection were necessitated by the amendment as set forth above.

Conclusion

19. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Werner (US 3689280) teaches white pieces of dough placed in a pattern within recesses of chocolate dough.

20. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

21. A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within

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TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

22. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (571) 272-1402. The examiner can normally be reached on 7:00AM-3:30PM M-F.

23. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

24. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



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